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EQUITABLE INTERESTS IN FOREIGN PROPERTY.

Dedicated to Professor Langdell.

THE law of the situs governs the title to land. No more generally accepted doctrine, or one more clearly based upon principle and reason, exists in the whole body of the law. And this is as true of equitable as of legal title. Indeed, the distinction between legal and equitable rights is merely a distinction of municipal law, though it is fundamental and widespread. Looked at from within, the equitable interest is sharply contrasted with the legal; but viewed from without, the legal owner and the beneficiary are both alike persons who have claims, large or small, upon the land. Whether they work out their right through the sheriff or the chancellor is, after all, a question of procedure. Though the Massachusetts judge is quite familiar with a division of equitable and legal rights in Massachusetts land, if his attention is called to land in New York he is concerned only with the question what is the nature of a certain person's interest in it as a matter of fact; not by what process or as a result of what legal or equitable principle of New York law has the interest been created.

The law, then, treating equitable interests in land in this respect like legal interests, holds that such interests are governed by the law of the situs. Thus the question whether a trust in land exists in favor of a certain claimant will in every court be determined as in the court of the situs. If by the law of the situs the transaction in question created a valid trust, the trust will be recognized in the courts of the situs;¹ and it will be recognized equally in the court of another country, though the law of the forum would not create a trust under the circumstances,² and even though by the law of the forum the creation of equitable interests is forbidden.³ On the other hand, if by the law of the situs the

¹ *Kerr v. White*, 52 Ga. 362.

² *In re Fitzgerald*, [1904] 1 Ch. 573 (C. A.); *Godfray v. Godfray*, 12 Jur. N. S. 397 (Privy Council); *Knox v. Jones*, 47 N. Y. 389. In *Seaman v. Cook*, 14 Ill. 501, the law of the situs was applied, but was found to be the same as that of the forum.

³ *Siebberas v. De Geronimo*, *Journal du Palais*, 1895, iv. 28 (Court of Cassation, Palermo, 1899), translated in 2 Beale, *Cas. on Conf. of Laws*, 204. In that case it

transaction did not create a valid trust, a trust will not be held to exist either in the courts of the situs¹ or even in another state where the law would have created a valid trust as a result of the transaction.²

The same doctrine applies, of course, to a determination of the rights in real estate (necessarily equitable in countries governed by the common law) created by a foreign contract of marriage or marriage settlement. Such rights must be created in accordance with the law of the situs.³ In the same way the question

appeared that a trust had been created in land in Malta in favor of an Italian. The Italian code had abolished all trusts. It was urged that this provision applied to all Italian citizens, and made such a trust void, at least so far as the Italian courts were concerned; and this contention prevailed in the lower courts. The Court of Cassation, however, held otherwise. "The Italian law has dissolved trusts, entails, and other settlements in perpetuity established according to previous law; but only those which existed within the kingdom, and not those which, established in another territory, are subject to another autonomous and independent sovereign. It is even more false to suppose, as the court appears to have done, and as the defendants in error continually do, that the trusts in this case should be considered subjectively null by reason of the provisions of our law, and as objectively valid because at Malta, where the property is situated, they are authorized. A right cannot be at once valid and null; and if an Italian court attributed to Italians the absolute title in property, and yet held the property subject to a trust in the country where it is situated, what could be the effect of such a decision? It could not be executed in the country of situs, and would consequently be a mere academic opinion, deprived of juridical and practical value."

¹ *Perin v. McMicken*, 15 La. Ann. 154; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. Rep. 413; *Parkhurst v. Roy*, 7 Ont. App. 614.

² *In re Piercy*, [1895] 1 Ch. 83; *Nelson v. Bridport*, 8 Beav. 547, 10 Jur. 1043; *Acker v. Priest*, 92 Ia. 610, 61 N. W. Rep. 235; *Levy v. Levy*, 33 N. Y. 97; *Purdum v. Pavey*, 26 Can. 412. In *Hawley v. James*, 7 Paige (N. Y.) 213, the trust was clearly invalid by the law of the forum, but the court, holding that the validity of the trust must be determined by the law of the situs, investigated that law, and found the trust invalid by that law also.

³ This is the doctrine universally held in this country. *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *Heine v. Mechanics' & Traders' Ins. Co.*, 45 La. Ann. 770, 13 So. Rep. 1; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. Rep. 974.

This is also the doctrine of the continental courts. Anonymous, 1 *Seuffert's Archiv* 57 (Court of Wiesbaden, 1841), translated in 2 *Beale, Cas. on Conf. of Laws*, 250; *Samuel v. Arrouard*, 21 *Clunet* 544 (Civil Tribunal of Versailles, 1893), translated *ibid.*, 251.

In England an indefensible case perhaps takes the opposite view; *De Nicols v. Curlier*, [1900] 2 Ch. 410. Spouses married in France under the community system emigrated to England, where the husband acquired land. After his death his wife was held entitled to a community interest in the land. The result was reached by treating the marriage as involving a contract that the land should be held in community, and then, neglecting the Statute of Frauds, enforcing this supposed contract. The passages cited from Story's *Conflict of Laws* were opposed to this conclusion. The better view

whether a certain transaction constitutes a charge upon the separate estate of a married woman must be determined by the law of the situs.¹

But though the creation of equitable interests in land is a matter for the law of the situs alone, it does not follow that the courts of equity of another country may not in a sense exercise power over the foreign land, and deal with it as if equitable rights in it existed. It is clear that in certain cases a court of equity will decree a conveyance of foreign land in specific performance of a contract to convey,² or require mutual deeds to rectify the boundaries of foreign land,³ or decree a reconveyance for fraud.⁴ Such action of a court of equity is usually taken on the ground that the contract or the fraud creates a constructive trust, which equity is enforcing; and where the law of the situs creates such a constructive trust there is no obstacle to prevent a court of equity in another state, having jurisdiction of the parties, from enforcing the trust. But the power to enforce a conveyance of foreign land is not confined to cases where a constructive trust exists by the law of the situs; the foreign court may decree a conveyance as a remedy for a tort or breach of contract of the defendant, although no right to a conveyance is recognized in the courts of the situs.

The leading case of this sort is *Lord Cranstown v. Johnston*.⁵

is that taken by the American courts, that such a "contract" does not apply to land situated abroad. *Fuss v. Fuss*, 24 Wis. 256, 1 Am. Rep. 180, and cases cited.

¹ *Read v. Brewer*, 16 So. Rep. 350 (Miss., 1895); *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. Rep. 587. Therefore, where a married woman made an agreement in Louisiana, invalid by the law of Louisiana, the invalid agreement would nevertheless charge her separate estate in Mississippi land if such was the law of Mississippi. *Frierson v. Williams*, 57 Miss. 451.

² *Toller v. Carteret*, 2 Vern. 494.

³ *Penn v. Lord Baltimore*, 1 Ves. 444.

⁴ *Arglasse v. Muschamp*, 1 Vern. 75; *Massie v. Watts*, 6 Cranch (U. S.) 148.

⁵ 3 Ves. 170. In *Purdom v. Pavey*, 26 Can. 412, the Canadian court refused to apply the Canadian law of fraudulent conveyances and decree to a creditor of a Canadian insolvent a conveyance of land in Oregon conveyed in Canada by the insolvent to the defendant. Strong, C. J., said: "Whether the allegation of a 'trust' of the purchase-money secured by the mortgage, which the plaintiffs allege, is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitae*, and from this alone it follows that the forum of the situs is the proper forum." If a so-called conveyance in fraud of creditors were a tort, this would seem to be opposed to the doctrine of *Lord Cranstown v. Johnston*. But in fact the act simply affects the title to land, and does not create a personal obligation, for breach of which suit can be brought. It has been suggested in one or two later cases that the doctrine of *Lord Cranstown v. Johnston* must be confined to land

The defendant, being a creditor of the plaintiff, lulled him into security, and refused offers of payment and requests for an account, and meanwhile brought suit against him in the island of St. Christopher, obtained judgment, had land there sold to satisfy the judgment, and bought it himself at an inadequate price. It was admitted that the plaintiff had no claim upon the land, either legal or equitable, in St. Christopher's; yet on his bill in England for a reconveyance the court granted a decree, — the Master of the Rolls, Sir Richard Pepper Arden (Lord Alvanley) saying, "I must forget the name of the court in which I sit if I refuse to grant it." Though the judgment and the sale were regular, a cause of action existed because of the fraud on the plaintiff perpetrated in England.

In *Ex parte* Pollard¹ the petitioner was a creditor with whom a bankrupt, previous to the bankruptcy, had deposited by way of security the documents of title to land in Scotland. This transaction involved an agreement to make a mortgage, and in England would be treated as a mortgage in equity. In Scotland the contract would be legal, but the transaction would not create any lien or equitable mortgage on the land. Lord Cottenham allowed the petitioner to subject the Scotch land to his debt, saying:

"It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitae*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."²

which is in some part of the British dominions; but there is no warrant for this view in the case itself or in principle, and it has never been seriously urged.

¹ Mont. & C. 239.

² See to the same effect *Scott v. Nesbitt*, 14 Ves. 438, where Lord Eldon "upon principles of natural justice" charged upon a West Indian estate the balance of an account in favor of a managing co-owner, though the law of the situs allowed no charge.

In such cases as these, it seems clear that the court is enforcing a remedy for a breach of obligation, not executing a constructive trust in the land. It is true, as has been said, that equity usually acts in such cases by way of executing an existing property right; but Lord Cottenham seems entirely correct in saying that a court of equity has power to decree a conveyance as remedy for a mere breach of personal obligation. That such a power was exercised by the earlier chancellors no one will deny; that the interest in land called a constructive trust is a result, not a cause, of this exercise of jurisdiction, is clear; and there is no reason for assuming that this ancient power has departed out of chancery, or that the chancellor cannot still exercise his prerogative, though the redress asked is for a purely personal wrong.¹

If, however, a contract creates an equitable interest in the land, in the nature of a constructive trust, by the law of the situs, this interest in the land will be everywhere recognized. Thus, where the title deeds of land in New York were deposited by the owner as security, and this transaction by the law of New York created an equitable mortgage, the existence of the equitable interest was recognized in a suit in New Jersey, although such a deposit of deeds did not by the law of New Jersey create an equitable interest in the land.² Upon a similar principle, where a contract concerning land in Massachusetts was made in North Carolina, the Massachusetts court recognized and enforced the interest in land thereby created by Massachusetts law, though the contract, being one between husband and wife, was one which could not have been

¹ It has been suggested that in such a case it is proper to speak of the foreign court as enforcing an equitable right to the land created by its law; an imperfect right, to be sure, and one not recognized at the situs of the land. To this theory there seem to be insuperable objections. First, it is opposed to the fundamental doctrine that interests in land can be created only by the law of the situs, since that law only can make interests in the land effective. Second, such a right would fail of recognition not merely at the situs, but in every other country as well. Another state, to be sure, might also grant equitable relief; but that would be in accordance with its own doctrines, not at all because of the decree or the possibility of the decree of the court under consideration. A right the existence of which will not be recognized either in the state controlling the *res* or in any third state can hardly be called a right of property. Third, the cases about to be considered carefully distinguish between the right, created by the law of the situs alone, and the remedy which may be given by the foreign court. The accurate way of describing the case seems to be that the foreign court treats the defendant *as if* the plaintiff had an equitable right in his land.

² *Griffin v. Griffin*, 18 N. J. Eq. 104.

made in Massachusetts, nor could suit be brought in that state on the contract.¹

So far as our investigation has proceeded we may summarize the results as follows. An equitable interest in land can be created only by the law of the situs: if that law creates an interest, the courts of all other states must recognize and enforce it; while, if the law of the situs does not create the equitable interest, no foreign court can assume the existence of such an interest. But since equity acts *in personam* it has power to act whenever it has jurisdiction over the person of a defendant; and if a defendant is shown to be in default for a breach of obligation, it may, in some cases at least, decree a conveyance of land by way of reparation for the injury, although there was no prior interest in the land created by the law of the situs. The limitations of this power must now be examined.

First, there must be a real obligation growing out of the transactions of the parties. If there is no equitable interest in the land, and there is no independent legal obligation in the owner to deal with the land for the benefit of a *cestui que trust*, the court of equity of another state cannot create and enforce such an obligation merely because it has power over the owner and regards the transaction as one which should have given rise to a trust. If I have been given land in state A under such circumstances that I have a complete title to it, and a right to do as I please with it, and I choose, for instance, to sell it and carry the proceeds into state B, the latter state cannot charge me with a trust for another merely because by the law of B the transaction by which I got title to the land would have resulted in my taking it in trust. If, to be sure, I had got the land by fraud, or had made and broken a contract to use the land for the benefit of another, I could be sued in state B for my breach of obligation, and state B, having jurisdiction over me, might compel me to give up the proceeds; but it could not call me to account merely for my failure to carry out a non-existent trust. The change in the corpus of the property from land to money and bringing the money into state B would not work a change in my rights. If I could not be made a trustee of the land, neither could I of the money.

Thus in a late English case Scotch immovables had been settled upon trust without power of alienation. The trustees had sold the

¹ Polson v. Stewart, 167 Mass. 211, 45 N. E. Rep. 737.

Scotch property and had invested the proceeds in English securities. The trusts in the proceeds were held still to depend upon Scotch law.¹ The Lord Justice Cozens-Hardy said, "I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement."²

In one case, however, the court took a different view. An English testator devised land in Italy to trustees to sell and invest in English securities or land. By the law of Italy the devisee took freed from any trust. He sold part of the land; it was held that he took the proceeds upon the original trusts.³ The sale of the land, Mr. Justice North said, was not forbidden by Italian law.

"It is, indeed, said by one of the Italian advocates that the land is the 'patrimony,' and that, when the land is sold, the proceeds of sale — the money — are still the 'patrimony.' What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator's will, because the disposition is good according to English law, and is in no way at variance with Italian law, — meaning now by 'Italian law' not merely anything which is expressed in the Italian Code, but anything contrary to 'good custom' (whatever that may mean), — for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also."

As to that portion of the Italian land which was unsold, it was admitted that the Italian law governed all interests in it.

¹ *In re Fitzgerald*, [1904] 1 Ch. 573 (C. A.).

² See to the same effect *Waterhouse v. Stansfield*, 9 Hare 234, 10 Hare 254; *In re Hawthorne*, 23 Ch. D. 743; *Butler v. Green*, 65 Hun 99, 19 N. Y. Supp. 890. In *Nelson v. Bridport*, 8 Beav. 547, 10 Jur. 1043, the question was left undecided.

³ *In re Percy*, [1895] 1 Ch. 83.

"The trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place."

So far as this case presents the general question of the right of an English court to attach an equity to the proceeds of foreign land, it is submitted that the decision is erroneous, and is opposed to the decisions previously cited. It may be possible to support it on another ground. The trustee took not merely this land under the will, but also a large English estate, which he held in trust under the English law. It might be defensible to say that his acceptance of the whole trust involved a contract to perform so far as he was able the provisions of the will, and that the English court was really granting specific performance of this obligation, upon the principle already explained. This would involve a mere question of English law.

The court in this case in fact proceeded largely on the ground that the will effected an equitable conversion of the land into personalty. But it seems clear that the question whether land has been equitably converted into personalty must be determined by the law of the situs of the land;¹ and the Italian law did not permit the equitable conversion. In a somewhat similar American case the testator, domiciled in Pennsylvania, directed the sale of land in New Jersey, the proceeds to be held on certain trusts invalid by the law of Pennsylvania. The New Jersey court held the trust invalid, because the Pennsylvania law applied; the land in New Jersey being to be sold, and therefore not involved in the trust.² The distinction, however, between the cases is that in the American case the New Jersey law permitted the trust, and so far as the land was concerned allowed the sale and would have attached the trust to the proceeds; but by the law of New Jersey the land was regarded as equitably converted into personalty, and the law of the domicile was therefore

¹ *Clarke v. Clarke*, 178 U. S. 186. Conversely, the question whether personalty has been so far converted into land by a will that the validity of the trust on which the land is to be held is governed by the law of the situs of the land to be purchased, will be determined by the law that governs the personalty, that is, the law of the domicile. *Macpherson v. Stewart*, 28 L. J. Ch. 177, 32 L. T. R. 143.

² *Jenkins v. Guarantee T. & S. D. Co.*, 53 N. J. Eq. 194, 32 Atl. Rep. 208. See to the same effect *Bible Society v. Pendleton*, 7 W. Va. 79.

the law which New Jersey applied to the legacy. On the same ground of equitable conversion the validity of a trust in a will which devises land in one state to be sold and the proceeds invested in lands in another state on the trust in question has been held to depend upon the law of the second state.¹

The second limitation on the power of a foreign court to decree a conveyance by a defendant within its jurisdiction is this: that the obligation violated must have run from the defendant to the plaintiff. If land in a common law state subject to an equitable claim is sold to a purchaser with notice, he is bound to respect the equity. But this is because he takes the land subject to the other's equitable right; and if by the law of the situs there is no equitable right in the land, the purchaser cannot be subjected to a claim on the part of the asserted beneficiary, even though he would be held a trustee if the land were in the state of forum. The doctrine of Lord Cranstown *v. Johnston* and of *Ex parte Pollard* cannot be invoked unless there is privity of obligation between the parties.

The question was first debated in the case of *Martin v. Martin*.² In that case a wife owned before marriage an estate in Demarara, which by the marriage settlement was settled on her and her children. This settlement, however, did not affect the title, either legal or equitable, according to the law of Demarara. The husband and wife after marriage mortgaged the land to the defendants with notice of the settlement, and the mortgage was duly enrolled in Demarara. This was a bill to declare the mortgage void. Leach, Master of the Rolls, held that the English court could not hold the defendant bound by any equity arising out of the settlement.

"The settlement as executed does by the law of Demarara in no manner affect the right and power of the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had if there had been no settlement. The equity of the wife appears to me, therefore, not to be attached to the estate, but to the person of the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent."

This principle was further applied in the case of *Norris v. Chambres*.³ The plaintiff had purchased and partly paid for land

¹ *Ford v. Ford*, 80 Mich. 42, 44 N. W. Rep. 1057; *Ford v. Ford*, 70 Wis. 19, 33 N. W. Rep. 188.

² 2 Russ. & M. 507.

³ 29 Beav. 246, 30 L. J. Ch. 285, 7 Jur. N. S. 59, 9 W. R. 259; on appeal, 2 De G. F. & J. 583.

in Prussia; but before he secured a conveyance the owner conveyed to the defendant with notice. The court held that unless the law of Prussia created an equity in the land an English court could not charge the land in the defendant's hands with the amount paid by the plaintiff, even by a decree operating purely *in personam*. Romilly, Master of the Rolls, said:

"Independently of the lien which this court is asked to declare, if needed, and which it is not asked to create, there is no equity between the parties; here the plaintiff is entitled to no decree against the defendants for payment of any sum of money, nor is any such claimed, but the equity and relief sought begin and end with a prayer to make a certain transaction between other persons, one of whom is a stranger to the plaintiff, an interest in an estate in Prussia, belonging to that stranger, and this independently of all personal equities attaching upon him. I never heard of any such case, and I will not be the first judge to create such a precedent, which, if adopted, for aught I see, would go to assert a right in the courts here to determine questions between foreigners, relating exclusively to immovable property in their own country."

In affirming this opinion Lord Campbell also pointed out that there was no contract between the parties. These decisions have been universally followed.¹

If, however, the purchaser with notice contracts to pay the money due on account of the land from the seller to a third party, the foreign court having jurisdiction of the purchaser may compel him to make the payment out of the land. By reason of his contract he is in personal default, and the court may give a redress which includes a decree that he shall deal in a certain way with the land. In *Mercantile Investment & G. T. Co. v. River Plate T. L. & A. Co.*² it appeared that an American corporation, holding a grant of land from the Mexican government, issued debentures purporting to bind the land; but the hypothecation was not duly registered in Mexico, and therefore did not bind the land. The corporation then transferred the land to the defendant, an English company, which as part of the consideration agreed to pay the debentures. The

¹ *Hicks v. Powell*, L. R. 4 Ch. 741, 17 W. R. 449; *Norton v. Florence L. & P. W. Co.*, 7 Ch. D. 332, 38 L. T. R. 377, 26 W. R. 123; *In re Hawthorne*, 23 Ch. D. 743. In *Norton v. Florence L. & P. W. Co.*, Jessel, M. R., said: "You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property, if the law of the country in which the immovable property is situate does not so bind it."

² [1892] 2 Ch. 303.

plaintiffs, holders of the debentures, filed their bill to have the proceeds of the land applied to the payment. Mr. Justice North, after citing the case of *Lord Cranstown v. Johnston*, said:

"It would be most unconscionable to allow the defendants here, who have registered their assignment in Mexico subject to the obligations created in favor of the plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of those obligations and the taking by the English company upon themselves of the burden of satisfying those obligations; in my opinion it would be as unconscionable as anything could be to say that now, because they had registered their transfer before the hypothecation of the plaintiffs had been registered, they are at liberty to set the plaintiffs at defiance altogether. It was said that the case I have cited went upon fraud. Such a fraud as there was in that case I think would equally exist in the present case if the English company were attempting to do what their counsel claims for them a right to do. . . . In my opinion they clearly would be liable if they misapplied the proceeds of this land without making due provision for the plaintiffs' claims; and, in my opinion, they could be restrained by this court from so applying any part of the proceeds of the land which ought to go to satisfy those claims, and, what is more, I think that the company and every officer who took part in such proceedings would be personally responsible to the court in respect of any such misapplication of the funds which might be made."

The third limitation on the power of the court to make any decree for a reconveyance of foreign land is based on the lack of jurisdiction of a court of equity to order the doing of an act on foreign soil. The decree of the court cannot directly affect the foreign land; if it is to be effective, it must be through a conveyance of the land by the defendant. In countries governed by the common law land may be conveyed by a deed made anywhere; and a court of equity may therefore make an effective decree by ordering the defendant to give a deed of foreign land. But in countries governed by the civil law a conveyance of land or of any interest in land is usually ineffective unless it is registered in the country of the situs. A court of equity cannot decree such registry; and therefore it cannot through its jurisdiction over the owner of land in such a country exercise any control over the title to the land. As Lord Campbell said in the case of *Norris v. Chambres*:¹

"An English court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a

¹ 2 De G. F. & J. 583.

foreign court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen*."

The principles regulating trusts of movables are more complex but more restricted. No case has been found, and probably none exists or is likely to be decided, where a court has attempted to find grounds for ordering a conveyance of foreign movables, not the proceeds of foreign land, on the ground merely of fraud or breach of contract. We have to consider only cases of express trust.

On the other hand, land must always remain in the place where it was at the time of creation of the trust; movables, however, may be removed into another place, and thus become subjected to another law. Questions as to trusts in movables therefore fall into two classes: questions concerning the creation of the trust, and questions concerning its administration.

A trust may be created either by will or by settlement *inter vivos*. As to a trust of movables created by will, there is no doubt that its validity must be tested in the first instance by the law of the testator's domicile. If valid by that law, it will be recognized and enforced everywhere,¹ though the trustee is domiciled at the time in another state which would hold the trust invalid,² or subsequently removes there,³ though the beneficiaries live in such a state,⁴ or the property is there at the time the trust is created.⁵

While this doctrine is universally admitted, it is to be noticed that the legality of the trust may, by the law of the domicile, depend

¹ *Godfray v. Godfray*, 12 Jur. N. S. 397; *Riddle v. Hudgins*, 58 Fed. Rep. 490; *English v. McIntyre*, 29 N. Y. App. Div. 439. Though the law of the domicile of the testator is applied, it is because such is the provision of the law of the actual situs; and the law is that which exists at the moment of devolution of the property. So where an Italian died, leaving English movables on certain trusts, and the law of Italy at the time of his death allowed the trusts, but was afterwards changed with a retroactive clause, the trusts were sustained. *In re Aganoor's Trusts*, 13 Rep. 677, 64 L. J. Ch. 521 (1895).

² *Handley v. Palmer*, 91 Fed. Rep. 948; *Hussey v. Sargent*, 116 Ky. 53, 75 S. W. Rep. 211; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252; *Cross v. United States Trust Co.*, 131 N. Y. 330, 30 N. E. Rep. 125; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. Rep. 407; *De Renne's Estate*, 12 Wkly. N. Cas. (Pa.) 94.

³ *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. Rep. 636.

⁴ *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252; *Merritt v. Corties*, 24 N. Y. Supp. 561; *Parkhurst v. Roy*, 7 Ont. App. 614.

⁵ *Despard v. Churchill*, 53 N. Y. 192.

upon the place where the trust is to be administered. Thus a statute forbidding certain charitable bequests may be held to apply only to bequests to be administered within the state, on the ground that the giving of itself is not the objectionable thing, but the administration of the gift; and it may accordingly be held that such a gift to a foreign charity is valid by the law of the domicile, in spite of the statutory provision against such gifts.¹

The validity of trusts created in a settlement *inter vivos* is not so clear a question. Older writers on the conflict of laws, alleging a maxim *mobilia sequuntur personam*, laid it down that the law of movables was the law of the domicile of the owner. But this fictitious doctrine has been practically abandoned in modern times so far as tangible movables are concerned, and the rule which is in consonance with reason has been accepted: that the validity of a transfer of chattels depends on their situs at the time of transfer.² In accordance with this doctrine it seems to be held that the validity of a trust in tangible movables depends upon the law of their situs at the time the trust settlement was made.³

This principle seems to have been involved in the case of *Van Grutten v. Digby*.⁴ In that case a woman, entitled to property under an English trust, married in France. A marriage agreement was made in France, which was invalid by French law, but would by English law be a valid limitation of the terms of the original trust. The court held that the effect of this agreement upon the English trust must be determined by the English law. Romilly, Master of the Rolls, said that if a contract relates to the regulation of property within the jurisdiction and subject to the laws of England, the court will administer the law as if the whole transaction were to be regulated by English law.⁵

In the case of *Fowler's Appeal*⁶ this question was involved, but was not finally settled. The settlement was made in Illinois, by a person domiciled there. The property, so far as appears, consisted

¹ *Sickles v. New Orleans*, 80 Fed. Rep. 868; *Van Sant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Despard v. Churchill*, 53 N. Y. 192; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. Rep. 558.

² *Cammell v. Sewell*, 5 H. & N. 728; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, 7 Wall. (U. S.) 139.

³ So far as choses in action were included in the settlement, the validity should be determined primarily by the place of making the settlement.

⁴ 31 Beav. 561, 32 L. J. Ch. 179, 7 L. T. R. 455, 9 Jur. N. S. 111, 11 W. R. 230.

⁵ This case was followed in *Viditz v. O'Hagan*, [1899] 2 Ch. 569.

⁶ 125 Pa. St. 388, 17 Atl. Rep. 431.

in stock of corporations outside Pennsylvania. The trustee was a Pennsylvanian. The court, without deciding what law would govern the validity, held that it was not that of Pennsylvania.

So far we have considered merely the validity of the conveyance in trust; but it is still necessary to determine what law governs the administration of the trust. Since it becomes the duty of the trustees, if the trust is valid, to take the chattels to a certain place and administer them there, and there is nothing in the law of any state to prevent them from taking the chattels to that place, the chattels, if the provisions of the trust are carried out, will be submitted, as to all questions arising in the course of administration, to the law of the place where the trust is to be administered. This place is sometimes easy but often difficult to determine. In case of a trust created by will, the place of administration will ordinarily be the place of settling the estate, that is, the domicile of the testator, irrespective of the domicile of the trustee or of the beneficiaries.¹

There is, however, a class of trusts created by will where the administration of the trust is clearly to be elsewhere than the domicile of the testator. A typical case of this class is a bequest to a charity permanently located in another state. In such a case, if the mere gift in trust is in itself valid, the validity of the administration of it is to be governed by the law of the place where the charity is to be located; and that law determines all questions concerning the administration, such as alienability, accumulation, etc.² So where an Ontario testator bequeathed movables to the State of Vermont, on certain trusts, with provisions for accumulation, the law of Ontario determined whether such a direction invalidated the bequest; and the bequest being valid, it was for Vermont to determine whether the accumulation should be carried out, or the period of enjoyment accelerated.³

A question of interpretation is presented by the mortmain acts of several states. Do such acts forbid the administration of testamentary gifts by charities, or do they simply limit the right to pass the property on the proposed trusts? It is now agreed that they do not limit the power to administer; and that if a gift is made to a charity by a testator domiciled in a state where there is no

¹ *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. Rep. 252.

² *Ibid.*

³ *Parkhurst v. Roy*, 7 Ont. App. 614.

mortmain act, the gift may be taken and administered in a state where the gift would have been illegal.¹

In the case of a settlement *inter vivos* the place of administration of the trust is a more difficult question. In many cases the situs of the trust will be taken to be the place of creation, that being the settler's domicile; and all questions involving the administration of the trust will be determined by that law, though the trustee may be domiciled elsewhere or may subsequently remove to another state.²

The most important questions of this sort have arisen in England upon marriage settlements. If both parties to the marriage are domiciled in one country, the situs of the trust would naturally be in that country. So where upon a marriage of a Scotch man and woman a marriage settlement was made by virtue of which the husband had a right upon a certain contingency to have the property transferred to him absolutely, this transfer was ordered by an English court, though opposed to the English practice, which would have required a provision for the wife and children in such a case.³

On this principle the interesting case *In re Fitzgerald*⁴ may be supported. A marriage being had between an Englishman and a Scotchwoman, a settlement was entered into, by which several English trustees were constituted to hold and manage English chattels settled by the husband and Scotch chattels settled by the wife. The parties intended to live in England. The question was whether an alienation by the husband of all his interest under the

¹ *Canterbury v. Wyburn*, [1895] A. C. 89 (Privy Council) (see however *Attorney-General v. Miller*, 3 Russ. 328, 3 Dow & Cl. 393); *Healy v. Reed*, 153 Mass. 197, 26 N. E. Rep. 404; *Fellows v. Miner*, 119 Mass. 541; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. Rep. 407. In the last case the chattels bequeathed were in the state where the charity was established; nevertheless, in spite of the mortmain act of that state, the bequest was held good. Conversely, the rule against perpetuities has to do with the administration of the trust. It was held that a direction in a will of a testator who was apparently English to invest money in Scotch land would be carried out, though the trusts on which the land was to be held were forbidden by the English law as violating the rule against perpetuities. *Fordyce v. Bridges*, 2 Phil. 497, 17 L. J. Ch. 185.

² *First Nat'l Bank v. Nat'l Broadway Bank*, 156 N. Y. 459, 51 N. E. Rep. 398. So in *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. Rep. 572, a married woman having constituted herself a trustee in New York, her subsequent removal to New Jersey, where a married woman could not take personal property, did not put an end to the trust.

³ *Anstruther v. Adair*, 2 Myl. & K. 563.

⁴ [1903] 1 Ch. 933. The case was reversed on appeal because the corpus of the trust was found to be Scotch immovable property. [1904] 1 Ch. 573.

settlement was valid, as it would be by English law, or invalid according to the Scotch law. The court decided that the parties intended an English trust, and that the alienability should be determined by the English law. But in *Heywood v. Heywood*,¹ where an Irishwoman married an Englishman, and each settled money in English trustees, Romilly, Master of the Rolls, seems to have inclined to the opinion that as to the sum contributed by the wife this was an Irish trust.

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¹ 29 Beav. 9, 30 L. J. Ch. 155.